

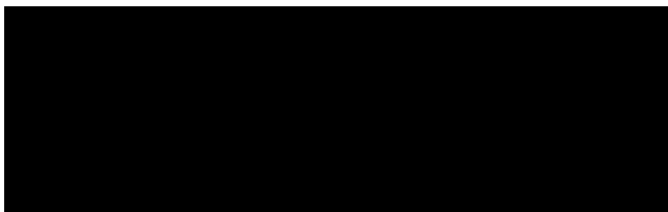


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



copy

FEB 14 2000

File: EAC 99 043 51833

Office: Vermont Service Center

Date:

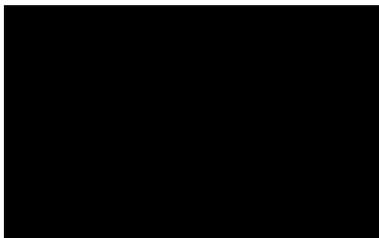
IN RE: Petitioner:  
Beneficiary:



PETITION:

Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



identifying documents to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

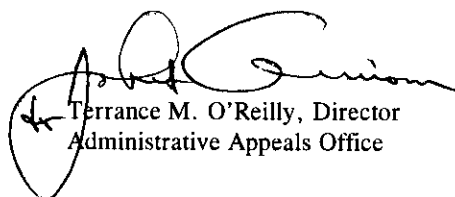
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a painting and sandblasting company, seeks to employ the beneficiary until November 19, 2001 as a chemical technologist in the H-1B classification for specialty occupations at \$11.90 hourly. The director requested further evidence in a notice issued December 15, 1998 (I-797), and counsel submitted a letter of February 10, 1999 (I-797 transmittal) and evidence. In the decision of April 16, 1999, the director determined that the job offered does not qualify as a specialty occupation and denied the petition. The petitioner appealed on May 7, 1999 and submitted a brief (appellate brief).

Provisions of § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. The definition in § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), describes a "specialty occupation" as one which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Regulations in 8 C.F.R. 214.2(h)(4)(ii) define the term specialty occupation as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Before filing the petition on November 20, 1998, the petitioner did not secure a certification from the Secretary of Labor of a labor condition application (LCA) for the occupation in question. 8 C.F.R. 214.2(h)(4)(i)(B)(1). The Secretary made the certification only afterwards, on January 6, 1999, and it stated the wage rate which the petition proposed for the proffered position of chemical technologist. Only the director may determine that the proffered position is a specialty occupation. 8 C.F.R. 214.2(h)(i)(B)(2).

The record did not evidence a copy of the contract or a summary of the terms of the oral agreement under which the petitioner will employ the beneficiary, one of which must accompany the petition. 8 C.F.R. 214.2(h)(4)(iv)(B). The petitioner's letter of November 19, 1998 (job offer) described the position's duties as testing. The beneficiary's resumé claimed a master's degree and ten years of post graduate experience.

Counsel's I-797 transmittal confirmed, also,

... The tests involve the utility of the paints and coatings and include such aspects as durability, cost, reduction in cost of maintenance, safety to workers in application, appearance, and conformity to the engineering standards of the Department of Transportation....

The appellate brief gratuitously extended the specific position's duties without benefit of a contract or oral agreement,

... The position requires the application of chemical engineering principles and technical skills in the development and testing of paints, coatings, adhesive and surface treatments for structural members do [sic] determine performance, characteristics and whether or not they meet the standards required by State and Federal Departments of Transportation....

The specialty occupation itself must meet one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(A):

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner's offer of a wage amounted to about \$24,000 a year and suggests why no indicator proved that its position required a

bachelor's degree. Its bare statement of testing duties did not suffice. Nevertheless, the appellate brief defined the issue under subsection (1) as whether the bachelor's degree in chemical engineering is a "realistic prerequisite" for the position. On the contrary, the evidence must demonstrate that the petitioner or the industry normally exact the bachelor's degree for entry.

The argument for a normative requirement of a bachelor's degree relied on inconsistencies, said to appear in groupings of work in the Department of Labor's Dictionary of Occupational Titles, Fourth Edition, 1977 ("DOT"). The reviewer may agree that its Specific Vocational Preparation (SVP) scale does not furnish a basis to tell if a position demands a baccalaureate degree under subsection (1).

The SVP scale represents training which can be acquired in a school, work, military, institutional, or a vocational environment. It is not a gauge of education, but of training and occupational preparation. Therefore, it does not establish whether a position is classifiable as a profession contemplated in Section 101(a)(32) of the Act or as a specialty occupation. Counsel cited cases which related to preference classifications under predecessor statutes for immigrants and for unlike occupations. Matter of Wang, 11 I & N Dec. 282, 283 (assistant librarian); Matter of Shin, 11 I & N Dec. 686 (financial economist); Matter of Shao, 11 I & N Dec. 845 (financial economist); and Matter of Shih, 11 I & N Dec. 847 (librarian). Acknowledged inconsistencies in the DOT scale make it unpersuasive for this petition. Also, the latter two cases relied on the Occupational Outlook Handbook of the Department of Labor.

The decision properly cited the Department of Labor, Occupational Outlook Handbook, 1998-1999 Edition ("Handbook") for Engineering Technicians. Under "Nature of Work" at 93, it supports the decision's conclusion that the occupation does not qualify as a specialty occupation because the preparation for it falls short of a baccalaureate degree. The "Handbook" only goes so far as to say, under "Training, Other Qualifications, and Advancement" at 94,

Although it is possible to qualify for some engineering technicians jobs with no formal training, most employers prefer to hire someone with at least a 2-year degree in engineering technology. Training is available at technical institutes, junior and community colleges, extension divisions of colleges and universities, public and private vocational-technical schools, and through some technical training programs in the Armed Forces....

The occupation of the chemical engineering technician does not normally exact, as a minimum for entry, a baccalaureate or higher degree, or its equivalent, from an accredited institution. See § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1). Testing duties, as described in the job offer, did not attain that level. 8 C.F.R.

214.2(h)(4)(iii)(A)(1). Even if critical to the petitioner, they did not demonstrably require either a baccalaureate degree or the theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. 8 C.F.R. 214.2(h)(4)(ii).

The decision assayed the petitioner's proffered salary at less than half that expected. The claim that the position really was that of a chemical engineer founders on the fact that it paid half that of the specialty occupation of the chemical engineer, requiring a baccalaureate. Handbook for Engineers in "Earnings" at 86.

The petitioner offered work only at the level of testing, but not such as the Handbook in "Chemical Engineers" at 87,

Chemical engineers apply the principles of chemistry and engineering to solve problems involving the production or use of chemicals. They design equipment and develop processes for large scale chemical manufacturing, plan and test methods of manufacturing the products and treating the by-products, and supervise production....

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.